

**IN THE HIGH COURT OF TANZANIA**

**(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**HC. CRIMINAL APPEAL NO. 197 OF 2019**

(Arising from Judgment of the Resident Magistrate Court of Geita at  
Geita in Criminal Case No. 16 of 2017)

**KASIM SELEMAN @ GAMALE ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*Last Order: 26.02.2020*

*Judgment Date: 26.02.2020*

**A.Z.MGEYEKWA, J**

The appellant KASIM SELEMAN @ GAMALE on 1<sup>st</sup> count he is charged with an offence of Abduction contrary to Section 134 of the Penal Code Cap.16 [R.E 2002]. On 2<sup>nd</sup> count he is charged with demanding money with menace contrary 1292 of the Penal Code Cap.16 [R.E 2002] and on 3<sup>rd</sup> count, he is charged with

Rape contrary 130 (1) (2)(e) and 131 (1) of the Penal Code Cap.16 [R.E 2002].

The particulars of the offence on 1<sup>st</sup> count it is alleged that the appellant on 24<sup>th</sup> of December, 2016 at 18:00 at Jimboni area in the District and Region of Geita did unlawfully take one AZIZA D/O YOHANA aged 14 years out of the custody of her parents.

On 2<sup>nd</sup> count, it is alleged that on 24<sup>th</sup> of December, 2016 at 18:00 at Jimboni area in the District and Region of Geita did demand Tshs. 300,000/= from one YOHANA S/O STEPHANO @ LUPADE while threatening to continue unlawfully detaining AZIZA D/O YOHANA on failure to send the said money.

On 3<sup>rd</sup> count, it is alleged that the appellant on 24<sup>th</sup> of December, 2016 at 18:00 at Jimboni area in the District and Region of Geita did have carnal knowledge with one AZIZA D/O YOHANA aged 14 years out.

Consequently, the appellant was convicted and sentenced as he stands now. Dissatisfied and aggrieved by both conviction and sentence.

In the Petition of appeal, the appellant has listed eight grounds. However, the determination of ground 8 suffices to conveniently dispose of the appeal that the testimonies of all witnesses were not signed by the trial Magistrate at their end. The illegal procedure violates the proceeding and the judgment where in this case if it will retrial, the gaps of the evidence will be recovered as the case was not proved beyond reasonable doubts.

At the hearing of the appeal, the appellant was unrepresented whereas Ms. Fyeregete, learned State Attorney represented the respondent Republic.

In support of his appeal, the appellant had not much to say, he complained that he was alleged to have abducted the girl on 24.12.2016 but that is not true. He argued that the prosecution witnesses' evidence was contradictory; PW6 testified that he was arrested on 03.01.2017 while one Hidaya testified that he was arrested on 02.01.2017. The Doctor was not called to testify to prove that the victim was raped and other people who witnessed the said act also were not summoned to testify in court.

On the part of the Republic, the learned State Attorney supported the conviction and sentence. In support of ground 7 of the appeal, Ms. Fyeregete argued that there is nowhere the trial Magistrate addressed the appellant contrary to section 293 (2) and (3) of the Criminal Procedure Act, Cap.20. To fortified his argument she referred this court to page 23 of the court proceedings, the trial Magistrate closed the prosecution case, a prima facie case was established but the appellant was not explained his rights and right to call witnesses while section 293 (2) and (3) of the Act are coached on mandatory. She added that the appellant was not prejudiced because he said that he will testify under oath. She prays this court to disregard this ground of appeal.

As to the 8<sup>th</sup> ground of appeal, Ms. Fyregete conceded that the trial Magistrate did not append her signature after hearing the evidence of PW1, PW2, PW4, PW5, PW6, and DW1. Ms. Fyeregete said that it is contrary to section 210 (1) of the Criminal Procedure Act. She referred this court to the authority of **Yohana Makubi & another v R** Criminal Appeal No.556 of 2015. She pointed out that, such omission is fatal and the same renders the whole testimonies

to be quashed and the case to start afresh. She continued to submit that this court to consider that the prosecution evidence is heavy since the charges of Abduction and Rape are proved. She referred this court to PW1 evidence, that it was supported by PW2 evidence that the appellant took PW2 and later raped her. She added that PW2 evidence is corroborated by PW5 evidence and the Identification Parade was conducted and the victim identified the accused.

The learned Senior State Attorney vehemently submitted that the cautioned statement was tendered in court whereas, the appellant admitted to having committed the crime and he led the Police to the place where he was with the victim. She added that the Sketch Map (Exh.P2) proves that the appellant committed the crime. She valiantly stated that the best evidence is that of the victim there saying that PW2 was not examined is baseless. Supporting her submission she cited the case of **Juma John v R** Criminal Appeal No.191 of 2009 Mwanza (unreported) and the case of **Selemani Mkubmba v R** Criminal Appeal No.94 of 1999.

Ms. Fyeregete argued further that the first and second grounds have no merit because it was not the duty of the trial Magistrate to investigate other cases where the appellant was charged and convicted.

In conclusion, she reiterated that the said shortfalls vitiated the trial though the prosecution evidence is heavy enough to ground a conviction. She urged this court to quash the proceedings and remit back the file to the lower court. The appellant added that even the preliminary hearing was not conducted.

I have carefully considered the submission of the learned State Attorney, the appellant and the record of the lower court and the point for our determination is **whether the trial was flawed with procedural irregularities and if the trial was vitiated.**

It is in the record that the trial Magistrate conducted the hearing contrary to the law. The trial Magistrate recorded the evidence of PW, PW2, PW3, PW4, PW5, PW6 as well as DW1. However, he did not append signature after hearing of each witness's testimony. The omission is contrary to section 210 (1) of

the Criminal Procedure Act which regulates the mode of taking evidence in the subordinate court as provides hereunder:-

*" 210. -( 1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner-*

*(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record; ..."*

Basing on the above provision of law the trial Magistrate was required to append his signature at the conclusion of every witness testimony as it was held in the case of **Yohana Makubi** (supra) that:-

*" ...failure by the judge to append his/her signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted...."*

Guided by the above authority, the requirement of appending Magistrate's/ Judge's signature is mandatory since the witnesses and the trial Magistrate signature verifies the authenticity of the record otherwise the evidence is questionable. Referring to what was observed in the case of **Yohana Makubi** (supra) is that, in the absence of the signatures of the trial Magistrate at the end of the testimony of each witness Firstly, it is impossible to authenticate who took down such evidence. Secondly, if the maker is unknown then the authenticity of such evidence is put to question as raised by the appellant. Thirdly, if the authenticity is questionable, the genuineness of such proceedings is not established and thus; fourthly, such evidence does not constitute part of the record of trial and record before this court.

In view of the stated omission the trial proceedings of the Resident Magistrate Court of Geita in respect to Criminal Case No.16 of 2017 were vitiated the same are a nullity and neither did they constitute the record of the trial and the appeal before me. I am satisfied that before me there are no material proceedings upon which the appeal can stand. In this regard, I agree with Ms. Fyeregete, learned State Attorney submission and therefore I



proceed to invoke section 388 of the CPA quash the judgment, the trial proceedings of the Resident Magistrate Court of Geita and I as there was no any preliminary hearing which was conducted I order the same be conducted in accordance with the law. Thus, for the interest of justice, I order expedited retrial before another Magistrate Meanwhile the appellant shall remain in custody.

Order accordingly.

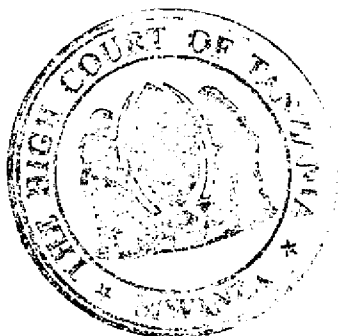
DATED at Mwanza this 26<sup>th</sup> day of February 2020.

  
A.Z MGEYERWA

**JUDGE**

26.02.2020

Judgment Delivered on 26<sup>th</sup> day of February 2020 in the presence of the appellant and Ms. Fyeregete, learned State Attorney for the Republic.



  
A.Z MGEYERWA

**JUDGE**

26.02.2020